

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

| | | |
|------------------------------|---|------------------------|
| STEVEN R. KINCAID, |) | |
| |) | |
| Plaintiff, |) | CA No. 04 CV 11522 WGY |
| |) | |
| vs. |) | |
| |) | |
| BANK OF AMERICA CORPORATION, |) | |
| |) | |
| Defendant. |) | |
| |) | |

**DEFENDANT'S MOTION FOR LEAVE TO UTILIZE
PREVIOUSLY DISCLOSED TREATMENT NOTES AND
TO QUESTION PLAINTIFF'S PSYCHIATRIST REGARDING SUCH NOTES**

INTRODUCTION

Defendant Bank of America Corporation ("Bank of America" or "the Bank") hereby moves for leave to utilize previously disclosed psychiatric treatment notes pertaining to the Plaintiff, and to question Plaintiff's psychiatrist regarding those records, during the trial of this case.

In support of this motion, the Bank states that it should be permitted to use the notes in this manner because Plaintiff has waived the psychotherapist-patient privilege by (1) placing his mental state at issue in this litigation and claiming more than "garden variety" emotional distress; (2) providing a written authorization for the use and disclosure of the notes in question; (3) testifying with regard to the notes and associated counseling session with his psychiatrist; and (4) failing to establish that his waiver was vitiated because of fraud, incapacity or duress.

In further support of this motion, the Court is respectfully referred to the accompanying memorandum, and the Affidavit of Richard Kane.

REQUEST FOR HEARING

The Bank requests a hearing on this motion.

BANK OF AMERICA CORPORATION,
Defendant
By its attorneys,

/s/Siobhan Sweeney
Siobhan Sweeney
BBO No. 562118
Mark Pogue
BBO No.
Edwards Angell Palmer & Dodge, LLP
101 Federal Street
Boston, MA 02110
Phone: 617.439.4444
Fax: 617.439.4170

Richard F. Kane (admitted pro hac vice)
Steven T. Ackermann (admitted pro hac vice)
McGuireWoods LLP
Bank of America Corporate Center
100 North Tryon Street, Suite 2900
Charlotte, North Carolina 28210
Telephone: 704.373.8999
Facsimile: 704.373.8827

Dated: January 4, 2006.

Certification of Conference Pursuant to LR 7.1

I hereby certify that prior to filing, the parties, through their counsel, have conferred with respect to Defendant's Motion For Leave To Utilize Previously Disclosed Treatment Notes And To Question Plaintiff's Psychiatrist Regarding Those Notes, and the issues raised therein, in an effort to narrow the areas of disagreement.

/s/ Siobhan Sweeney

